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Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Procedures for Reviewing Requests for	)	WT Docket No. 97-192
Relief From State and Local Regulations	)	
Pursuant to Section 332(c)(7)(B)(v) of	)	
the Communications Act of 1934	)	

U S WEST, INC. COMMENTS

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U S WEST, INC. COMMENTS

U S WEST, Inc. ("U S WEST") provides the following comments in response to the *Notice of Proposed Rulemaking* in the above-referenced proceeding.[1] At the outset, U S WEST submits that the importance of this proceeding should not be underestimated. The Commission's decision herein could directly determine how quickly the commercial mobile radio services ("CMRS") providers can meet the mission Congress and the Commission have established for the industry: the rapid deployment of numerous CMRS networks in all markets so the public has more choices, new services, and lower prices.

INTRODUCTION AND SUMMARY

Since the enactment of the Communications Act over 50 years ago, the Commission has possessed exclusive jurisdiction over radio frequency ("RF") emissions and interference matters.[2] Congress reaffirmed this jurisdiction only last year as part of the

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[1] *Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, WT Docket No. 97-192, *Notice of Proposed Rulemaking*, FCC 97-303 (released Aug. 25, 1997)("*Notice*").

[2] *See, e.g.*, 47 U.S.C. § 303(e) and (f); *see also* H.R. Conf. Rep. No. 104-458 (1996) at 209; *Head v. New Mexico Board of Examiners*, 374 U.S. 424, 430 n.6 (1963) (FCC has exclusive jurisdiction over radio technical matters). In fact, the federal government has exerted exclusive

Telecommunications Act of 1996 ("1996 Act') in declaring that local governments may not regulate CMRS and other "personal wireless" facilities on the basis of RF emissions. In the 1996 Act the Congress confirmed that the Commission alone may establish the technical standards governing RF emissions, and it gave the Commission express preemption power over state and local government actions which attempt to regulate RF emissions.[3]

The Commission revised its RF emission/environmental rules one year ago, and the amended rules "represent a consensus view of the federal agencies responsible for matters relating to the public safety and health," including the Environmental Protection Agency ("EPA"), the Food and Drug Administration ("FDA"), the National Institute for Occupational Safety and Health ("NIOSH"), and the "Occupational Safety and Health Administration ("OSHA").[4] Local governments did not participate in this rulemaking, nor did they participate in the recently decided reconsideration proceeding, suggesting that they do not question the adequacy of the Commission's revised (and more stringent) environmental rules.[5]

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control over radio issues since the Radio Act of 1927, 44 Stat. 1162 (1927). *See generally Whitehurst v. Grimes,* 21 F.2d 787 (D. Ken. 1927)(preempting local regulation over radio matters).

[3] *See* 47 U.S.C. § 332(c)(7)(B)(iv). The general rule is that local governments have limited regulatory authority over CMRS. *See id.* § 332(c)(3) (giving states non-rate, non-entry "other terms and conditions" authority over CMRS).

[4] *See Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation,* ET Docket No. 93-62, *Report and Order,* 11 FCC Rcd 15123, 15124 (1996) ("*RF Order*"), *compliance deadline extended, First Memorandum Opinion and Order,* 11 FCC Rcd 17512 (1997) ("*First RF Reconsideration Order*"), *Second Memorandum Opinion and Order,* FCC 97-303 (released Aug. 25, 1997) ("*Second RF Reconsideration Order*").

[5] This is further confirmed by the apparent absence of complaints filed by local governments. As discussed more fully below, Commission rules have always allowed interested persons, including local governments, to file complaints against licensees which they believed

Local governments, while neither challenging the adequacy of the Commission's environmental rules nor identifying any problem with licensee compliance with these rules, nonetheless assert that the 1996 amendments to the Communications Act "*preserve[]* the authority of state and local governments to ensure that [CMRS] facilities comply with the Commission's RF emission regulations."[6] The Act does no such thing. Local governments have never enforced Commission rules in the past, and nothing in the 1996 Act gives them such enforcement power now. As the Commission notes, the most the 1996 Act confers on local governments is the ability to "inquire" whether a specific CMRS base station/transmitter complies (or will comply after construction) with Commission RF emissions rules.[7] However, an ability to inquire into compliance with federal rules does not mean that a local government may also attempt to enforce the federal rules, or to prescribe separate RF emissions requirements.

Some of the proposals in the *Notice* are troubling because they would give local governments more authority over RF emissions than what Congress has specified. What is more, these proposals are directly contrary to the National Environmental Policy Act ("NEPA") and its implementing regulations. Indeed, U S WEST documents herein that the Commission cannot lawfully adopt some of its proposals unless it first modifies the very environmental rules it reaffirmed less than two months ago.

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might not be complying with these rules. *See* 47 C.F.R. § 1.1307(c). To U S WEST's knowledge, few, if any, RF emissions complaints have been lodged over the years.

[6] FCC Local and State Government Advisory Committee, Advisory Recommendation No. 5, ¶ 2 (filed June 27, 1997) (emphasis in original).

[7] *Notice* ¶ 142.

U S WEST also demonstrates herein the need for the Commission to adopt its proposed processes for reviewing expeditiously preemption petitions, and U S WEST supports the adoption of the Commission's proposed rebuttable presumption standard. U S WEST identifies several ways which, in its judgment, the Commission could make its proposals more effective. Among other things, the Commission should implement default judgment procedures and resolve preemption petitions not raising a material issue of fact within 30 days.

U S WEST finally recommends that the Commission extend its RF expedited procedures to all RF-related preemption petitions, including those where local governments have decided to regulate RF interference issues. Whether a local government regulates RF emissions because of interference or health concerns, the impact on carriers (and the public) is the same: delays in the provisioning of service and increased costs of service.

DISCUSSION

I. The Proposals for Categorically Excluded Facilities Would Constitute Local Government Regulation in Contravention of the Communications Act, NEPA Regulations, and Commission Rules

The Commission tentatively concludes that state and local governments may "inquire" as to whether a specific CMRS base station/transmitter complies (or, if not constructed, will comply) with Commission rules, but it concludes further that there should be "some limit to the type of information that a state or local authority may seek from a [CMRS] provider."[8]

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[8] *Id.*

U S WEST questions whether local governments really need to make inquiry regarding a licensee's compliance with Commission environmental rules. After all, complying with *all* Commission rules — including its environmental rules — is a condition of obtaining and maintaining a radio license;[9] and, non-compliance subjects Commission licensees to the full enforcement authority of the Commission.[10] Nevertheless, as a corporate citizen, U S WEST is not opposed to responding to reasonable inquiries from local government officials.

U S WEST does submit, however, that limits must be imposed on the type of information local governments may seek from Commission licensees. Thus, while U S WEST is not opposed to giving local governments the same information required by the expert agency (*i.e.*, the Commission), under federal law local governments have no right to seek *additional* information — information which the expert agency has determined is unnecessary. Such activity would constitute the very kind of local government regulation of the CMRS industry which the Communications Act forbids.

The Commission correctly proposes to impose this limitation for facilities not categorically excluded from its environmental rules. Specifically, the Commission proposes to limit localities "to requesting copies of any and all documents related to RF emissions submitted to the Commission as part of the licensing process."[11] U S WEST has no problem with this proposal.

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[9] *See Notice* ¶ 151.

[10] *See, e.g., Centel Cellular of N. Car. L.P., Memorandum Opinion and Order*, 10 FCC Rcd. 915 (1994) (imposing $3 million forfeiture for FAA violation), aff'd but penalty reduced to $2 million, *Memorandum Opinion & Order*, FCC 96-346 (released Aug. 21, 1996).

[11] *Notice* ¶¶ 143-44.

However, without explanation, the Commission proposes to adopt a very different approach for facilities which it has determined are categorically excluded from its environmental rules. As explained below, under both of the alternatives being considered, licensees would be required to provide local governments more information than the Commission, the expert agency, requires and for no legitimate purpose.

This latter proposal makes no sense. The Commission determined only last year, and reaffirmed less than two months ago, that requiring even routine environmental evaluations of categorically excluded facilities would be unnecessary and, as a result, "would place an unnecessary burden on licensees."[12] Adoption of either of the two proposals for categorically excluded facilities would also be inconsistent with the Commission's own environmental rules which, in turn, are based on the directives of NEPA and its implementing regulations. In addition, the proposals regarding categorically excluded facilities now being considered would allow local governments to regulate the CMRS industry in a way that Congress has determined is not permitted.

A. The Commission's Proposals for Categorically Excluded Facilities are Inconsistent with the Commission's Rules

U S WEST demonstrates in Section I.A.2 below that each of the two alternative proposals for categorically excluded facilities is inconsistent with the Commission's rules. However, U S WEST first reviews the categorical exclusion rules and their application to CMRS facilities.

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[12] *RF Order*, 11 FCC Rcd at 15156; *see also RF Second Reconsideration Order* ¶ 45.

1. The Categorical Exclusion Rules Generally and their Application to CMRS Facilities

The Commission's environmental rules are based on the National Environmental Policy Act of 1969 ("NEPA"),[13] which is the "basic national charter for protection of the environment."[14] Importantly, in enacting NEPA, Congress did not direct that environmental concerns be given paramount consideration, only that they "be given appropriate consideration in decisionmaking along with economic and technical considerations."[15] Thus, to ensure a proper balance among all considerations, Congress directed the conduct of an environmental assessment only for "major Federal actions" and, then, only as to those "major" actions which "significantly affect[] the quality of the human environment."[16]

Congress further established the Council on Environmental Quality ("CEQ") to implement NEPA's requirements.[17] CEQ has developed a category of activity — known as categorical exclusions — for which no environment assessment or demonstration of compliance is required. This category includes any action which does "not individually or cumulatively have a significant effect on the human environment and which have been found to have no such

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[13] National Environment Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852, *codified at* 42 U.S.C. §§ 4321-75.

[14] 40 C.F.R. § 1500.1; *see also* 42 U.S.C. § 4321 (NEPA was enacted to "encourage productive and enjoyable harmony between man and his environment."); *see generally The Fund for Animals v. Babbitt,* 89 F.3d 128, 130 (2d Cir. 1996) (discussing NEPA objectives).

[15] 42 U.S.C. § 4332(2)(B).

[16] *Id.* § 4332(2)(C).

[17] *See id.* §§ 4342, 4344.

effect."[18] Categorical exclusions, federal courts have noted, "promote efficiency in the NEPA review process."[19]

The CEQ has directed agencies like this Commission to use categorical exclusions whenever appropriate to "reduce excessive paperwork" and to "reduce delay."[20] Indeed, the CEQ Chairman has stated that "CEQ regulations direct federal agencies . . . to identify those actions which experience has indicated will not have a significant environmental effect and to categorically exclude them from NEPA review."[21]

The Commission's original environmental rules categorically excluded all CMRS base stations/transmitters from a routine environmental assessment. After the conduct of three proceedings (a notice of inquiry and two rulemakings),[22] the Commission was able to conclude

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[18] 40 C.F.R. § 1508.4. "By definition, CE's are categories of actions that have been predetermined not to involve significant environmental impacts, and therefore require no further agency analysis absent extraordinary circumstances." *City of New York* v. *ICC,* 4 F.3d 181, 185 (2d Cir. 1993); *National Trust for Historic Preservation* v. *Dole,* 828 F.2d 776, 781 (D.C. Cir. 1987). A "categorical exclusion is similar to a 'non-major' project." *Sierra Club v. Hassell,* 636 F.2d 1095, 1098 (5th Cir. 1981).

[19] *The Fund for Animals,* 89 F.3d at 130; *see also Mahler v. U.S. Forest Service,* 927 F. Supp. 1559, 1571, 1573 (S.D. Ind. 1996)("To prevent the environmental assessment process under NEPA from becoming unnecessarily burdensome, NEPA regulations allow agencies to adopt 'categorical exclusions.' . . . The categorical exclusion mechanism was designed to eliminate the need to investigate alternatives when the environmental impact of a proposed action would be minimal.").

[20] *See, e.g.,* 40 C.F.R. §§ 1500.4(p), 1500.5(k), and 1507.3(b).

[21] *Memorandum from Alan Hill, CEQ Chairman, to Heads of Federal Agencies, Guidance Regarding NEPA Regulations,* 48 Fed. Reg. 34263 (July 28, 1983); *see* 40 C.F.R. § 1507.

[22] *See Responsibility of the Federal Communications Commission to Consider Biological Effect of Radiofrequency Radiation When Authorizing the Use of Radiofrequency Devices,* Gen. Docket No. 79-144, *Notice of Inquiry,* 72 F.C.C.2d 482 (1979), *Notice of Proposed Rulemaking,*

based on the massive record evidence produced that "no data or specific evidence" had been submitted suggesting that CMRS base stations produced harmful exposures:

> We have not seen any evidence that excessive exposures, *i.e.*, those in excess of the ANSI RF protection guidelines, result during routine and normal operation of land-mobile and fixed communications services, including cellular radio.[23]

The Commission re-examined its environmental rules last year. After evaluating the new record evidence submitted, the Commission determined that "[w]e continue to believe that it is desirable and appropriate to categorically exclude from routine evaluation those transmitting facilities that offer little or no potential for exposure in excess of the specified guidelines."[24] In fact, the Commission noted that "[r]equiring routine environmental evaluation of such facilities *would place an unnecessary burden on licensees.*"[25] Nevertheless, largely at the recommendation of other federal agencies, including the EPA, and "out of an abundance of caution,"[26] the Commission decided to make its environmental rules more restrictive by

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89 F.C.C.2d 214 (1982), *Further Notice of Proposed Rulemaking*, 100 F.C.C.2d 568 (1985).

[23] *Responsibility of the Federal Communications Commission to Consider Biological Effect of Radiofrequency Radiation When Authorizing the Use of Radiofrequency Devices,* Gen. Docket No. 79-144, *Second Report and Order,* 2 FCC Rcd 2064, 2065 (1987); *see also id.* at 2066 ("With regard to land-mobile base stations and other fixed facilities, we do not believe that environmentally significant exposure is possible.").

[24] *RF Order,* 11 FCC Rcd at 15156; *see also Second Reconsideration RF Order,* ¶ 45 ("We continue to believe that it is desirable and appropriate to categorically exclude from routine evaluation only those transmitting facilities that we have reason to believe offer little or no potential for exposure in excess of our limits.").

[25] *RF Order,* 11 FCC Rcd at 15156 (emphasis added).

[26] *Evaluating Compliance with FCC Guidelines for Human exposure to Radiofrequency Electromagnetic Fields,* OET Bulletin 65, at 14 (Edition 97-01, Aug. 1997)("OET Bulletin 65").

categorically excluding only some CMRS base stations/transmitters and by requiring routine environmental assessments of other CMRS base stations — because the latter facilities "*may* offer the *potential* for causing exposures in excess of the [Maximum Permissible Exposure] limits."[27] These amended categorical exclusion rules, the Commission observed, "represent a consensus view of the federal agencies responsible for matters relating to the public safety and health."[28]

2. The Proposals for Categorically Excluded Facilities Are Inconsistent with Commission Rules

Under current Commission rules, many CMRS base stations/transmitters "are deemed individually and cumulatively to have no significant effect on the quality of human environment and are categorically excluded from environmental processing."[29] As a result, and consistent with CEQ and Commission rules, licensees are not required to demonstrate compliance with the Commission's environmental guidelines with respect to their categorically excluded facilities: "[T]he exclusion from performing a routine evaluation will be a sufficient basis for assuming compliance."[30]

Each of the proposals the Commission is considering for "categorically excluded" facilities would be inconsistent with these categorical exclusion rules. One of these proposals

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[27] *RF Order,* 11 FCC Rcd at 15157-58 (emphasis added).

[28] *Id.* at 15124.

[29] 47 C.F.R. § 1.1306(a). The CMRS base stations/transmitters that are not categorically excluded from a routine environmental assessment are specified in Rule 1.1307(a) and (b). *See id.* § 1.1307(a), (b).

[30] OET Bulletin No. 65 at 13. *See also* 47 C.F.R. § 1.1307(b)(1).

would permit local governments to demand that CMRS providers submit "a demonstration of compliance" with the Commission's "RF guidelines."[31] The only way a CMRS provider can demonstrate such compliance is by conducting emissions calculations or measurements of the facilities in question. However, under current rules, the facilities in question are categorically excluded from even routine environmental assessments because the Commission has determined these facilities pose no health risk to the public. Thus, to adopt this particular proposal would have the effect of repealing the Commission's categorical exclusion rules — action that would be inconsistent with federal law and action that would require CMRS providers to engage in activity that the Commission has determined is unnecessary.

The second alternative — which would permit local governments to require a CMRS provider to certify in writing that its proposed facility will comply with the Commission's "RF emissions *guidelines*"[32] — suffers from the same defect. Specifically, the only way a licensee can be sure that one of its base station/transmitters meets the "guidelines" set forth in Rule 1.1310 is to perform emissions calculations or measurements of the facility. Yet, again, Commission *rules* specify that the carrier need not even conduct a routine environmental

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[31] *Notice* ¶ 144. The Commission does not set forth in its *Notice* the type of demonstration it might require. Consequently, U S WEST does not understand how the Commission, as part of its Initial Regulatory Flexibility Analysis, could reasonably estimate that complying with its rulemaking proposal would take a licensee "approximately 5 hours" to complete. *See id.* at App. D. If the Commission were to require actual measurements (*see id.* ¶ 146), a license will more often than not be forced to spend well over five hours per facility — especially if the measurements must include other nearby transmitters — and without regard to the time required to document such testing results.

[32] *Id.* ¶ 143 (emphasis added). These guidelines are referenced in Rule 1.1310. *See* 47 C.F.R. § 1.1310.

assessment of a categorically excluded facility because the risk of excessive limits is so low, if non-existent.[33] In fact, Commission rules expressly provide that carrier need not make a "determination of compliance" for facilities that are categorically excluded:

> [A] determination of compliance with the exposure limits in § 1.1310 and the preparation of an EA if the limits are exceeded, is necessary only for facilities, operations and transmitters that fall into the categories listed in Table 1, or these specified in paragraph (b)(2) of this section. *All other facilities, operations and transmitters are categorically excluded from making such [demonstration of compliance] studies or preparing an EA.*[34]

The Communications Act precludes local governments from "regulat[ing]" CMRS facilities on the basis of RF emissions "to the extent that such facilities comply with the Commission's regulations concerning such emissions."[35] CMRS facilities classified as categorically excluded "comply with the Commission's regulations" by virtue of their classification as categorically excluded facilities. Consequently, requiring a licensee to make any demonstration of compliance with emissions "guidelines" in such cases would be inconsistent with the Communications Act, Commission rules, CEQ regulations, and NEPA itself.

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[33] 47 C.F.R. § 1.1306(a) ("Commission actions not covered by § 1.1307(a) and (b) are deemed individually and cumulatively to have no significant effect on the quality of the human environment and are categorically excluded from environmental processing.").

[34] *See id.* § 1.1310(b)(1); *see* also OET Bulletin 65, at 13 ("Normally, the exclusion from performing a routine evaluation will be a sufficient basis for assuming compliance, unless an applicant or licensee is otherwise notified by the Commission or has reason to believe that the excluded transmitter or facility encompasses exception characteristics that could cause non-compliance.").

[35] 47 U.S.C. § 332(c)(7)(B)(iv).

B. There Is No Reason for the Commission to Change Its Categorical Exclusion Rules

As noted, NEPA and its implementing regulations require the Commission to exclude from even routine environmental assessments transmitting facilities which "do not individually or cumulatively have a significant effect on the human environment."[36] The Commission determined over a decade ago and reaffirmed in August 1996 and August 1997 that certain CMRS transmitting facilities "offer little or no potential for exposure in excess of the specified guidelines" and such, as a result, to comply with CEQ regulations these facilities are excluded from even routine environmental assessments.[37] Consequently, local governments cannot require CMRS providers to make any type of "demonstration of compliance" without the Commission first changing its categorical exclusion rules — by moving all CMRS facilities to the non-categorically excluded category.

Local governments have submitted no reason for the Commission to change its categorical exclusion rules.[38] They have not timely questioned the Commission's environmental rules.[39] They have, moreover, not challenged the Commission's conclusion that requiring

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[36] 40 C.F.R. § 1508.4.

[37] *RF Order,* 11 FCC Rcd at 15156; *see also Second RF Reconsideration Order*, ¶ 45.

[38] A court will reverse a Commission decision categorically excluding certain facilities from conducting routine environmental assessments only if the decision is arbitrary and capricious and will give deference to the agency in interpreting its own regulations. *See, e.g., National Trust for Historic Preservation v. Dole*, 828 F.2d at 781.

[39] In any event, having neither participated in ET Docket No. 93-62 rulemaking nor having filed a reconsideration petition of the *RF Order,* local governments are now time-barred from complaining about the Commission's environmental rules. *See* 47 U.S.C. § 405(a); *see also Bicycle Trails Council v. Babbitt*, 1994 U.S. Dist. LEXIS 12805,*9 (N.D. Cal., Sept. 7, 1994).

routine environmental evaluations of categorically excluded CMRS facilities "would place an unnecessary burden on licensees."[40] Indeed, U S WEST is unaware of instances where local governments have filed complaints against CMRS providers alleging that base stations/transmitters fail to comply with Commission environmental rules or guidelines.

In short, local governments have provided no basis for the Commission to amend its categorical exclusion rules for CMRS facilities. Without such a rule change, the Commission cannot, consistent with NEPA and its implementing regulations, require CMRS providers to perform routine environment assessments, much less any type of demonstration of compliance.

C. Local Governments Still Retain the Right to Show Non-Compliance

Since the inception of its environmental rules over a decade ago, Commission rules have always permitted a local government (or any other interested party) to file a complaint if it had reason to believe that a particular transmitter, "otherwise categorically excluded, will have a significant environmental effect."[41] If the Wireless Telecommunications Bureau determines there may be merit to the petition, it may "require the [licensee] to prepare an EA [environmental assessment] which will serve as the basis for the determination to proceed with or terminate environmental processing."[42]

As noted, U S WEST is not aware of instances where local governments have filed petitions alleging that cellular, PCS or paging providers were not complying with the Commission's environmental regulations — confirming that licensee compliance with

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[40] *RF Order*, 11 FCC Rcd at 15156.

[41] 47 C.F.R. § 1.1307(c).

[42] *Id.*

Commission rules has not been a problem. Nevertheless, these Commission procedures remain in place and, if a local government truly has some reason to believe that a particular licensee is not complying with the Commission's environmental rules, it can submit a petition pursuant to these procedures. What a local government may not do is shift its burden of showing non-compliance to CMRS providers to demonstrate compliance. Such a transfer in burdens would constitute the very kind of local government regulation of the CMRS industry which the Communications Act and NEPA prohibit.

D. CMRS Providers Should Not Have to Pay Unnecessary Compliance Costs

The Commission seeks comment on which party — a local government or carrier — should pay the costs incurred in responding to a local government compliance request.[43] Cost recovery is a non-issue if the Commission maintains its current practice and current rules concerning categorically excluded facilities.[44] However, cost recovery would become a major issue if the Commission were to adopt either of its two proposals for categorically excluded facilities.

The Commission, in conjunction with other federal agencies such as the EPA, has determined that requiring even routine environmental assessments of categorically excluded facilities "would place an unnecessary burden on [CMRS] licensees" because categorically

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[43] *See Notice* ¶ 144.

[44] Cost recovery is also a non-issue for the proposal applicable to facilities which are not categorically excluded. Under the proposal, the only costs a carrier would incur would be the cost of photocopying its RF-related documentation which it submits to the Commission.

excluded facilities pose no risk to public health and safety.[45] Local governments have not challenged this consensus view of federal agencies charged with protecting public health and safety. Carriers should not have to pay for admittedly unnecessary tests requested by others — needless costs which would necessarily be passed on to consumers in the form of higher prices.

Moreover, if local governments were freed of the obligation to pay for tests they order, there would be no check on their incentive and ability to conduct such tests as often as they desire. If tests were "free" to local governments, they could easily delay service deployment at the outset and thereafter still require that licensees conduct such tests monthly, weekly, or even daily.[46] In this regard, U S WEST documents in Section III below how one municipality is delaying issuance of construction permits for a large number of cell sites because it has imposed unreasonable — and completely unnecessary — RF emissions test requirements on U S WEST.

Since the adoption of the Commission's environmental rules over a decade ago, Commission rules have permitted local governments and other interested parties to conduct RF emissions testing — at their own cost.[47] There is no reason in law or public policy to change this practice now. The Commission has determined that testing of categorically excluded facilities is unnecessary. If a state/local government disagrees with this conclusion, it is free to conduct its

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[45] *RF Order,* 11 FCC Rcd at 15156.

[46] As noted (*see* note 31 *supra*), U S WEST also believes that the Commission's time of compliance estimates for conducting "demonstration of compliance" studies is likely unreasonably low.

[47] *See* 47 C.F.R. § 1.1307(c).

own tests, but it should be required to pay for any additional testing it thinks may be appropriate.[48]

II. Expedited Review of Local Government RF Emissions Actions Is Important, But There Are Also Ways the Commission Can Make Its Procedures More Effective

The Commission, reaffirming that CMRS must be "deployed and delivered to consumers as rapidly as possible," proposes to adopt "clear procedures" which will permit "the rapid resolution of [RF preemption] requests."[49] Central to this plan is the proposal to presume that CMRS facilities are in compliance with the Commission's environmental rules and to therefore place on local governments the burden of overcoming this presumption by making a *prima facie* case for noncompliance.[50]

U S WEST supports this rebuttable presumption proposal and will not reiterate here the reasons such a procedure is necessary given the express Congressional mandate that CMRS systems be deployed rapidly and the express federal preemption over RF regulation.[51] However, U S WEST discusses below ways the Commission can make its procedures and

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[48] U S WEST further notes that any RF emissions testing conducted by state/local governments or other interested parties should comply with FCC requirements and OET Bulletin guidelines.

[49] *Notice* ¶ 118.

[50] *See id.* ¶¶ 151-54.

[51] It is important to emphasize that a tower siting decision of one local government oftentimes impacts the provision of CMRS beyond its borders. Experience has taught that consumers demand complete coverage within an area and that they will not accept holes in coverage. Thus, a delay caused by one local authority may prevent a CMRS provider from commencing service throughout a much large geographic area.

processes even more effective in achieving the desired end of resolving RF preemption petitions rapidly.

A. The Commission's Proposed Ripeness Standard Is More Stringent Than What Congress Has Specified

The Commission proposes to invoke its new expedited procedures only when the local government has taken a "final action," which it defines as a "final administrative action at the state or local government level."[52] This standard is more stringent than what Congress has directed, and its adoption would disserve the public interest.

The Commission apparently obtained its "final action" trigger from the first sentence of Section 332(c)(7)(B)(v), which provides:

> Any person adversely affected by any *final action* or failure to act by a State or local government . . . may . . . commence an action in any court of competent jurisdiction.[53]

But this sentence applies to reviews by courts of violations of subparagraphs (i) through (iii) of Section 332(c)(7)(B). The relevant statutory provision relevant to Commission review of violations of the RF emissions subparagraph (iv) is contained instead in the third sentence of Section 332(c)(7)(B)(v):

> Any person adversely affected by *an act* or failure to act by a State or local government . . . that is inconsistent with clause (iv) [pertaining to RF emissions] may petition the Commission for relief.[54]

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[52] *See Notice* ¶ 137.

[53] 47 U.S.C. § 332(c)(7)(B)(v)(emphasis added).

[54] *Id.*

Thus, Congress has expressly provided that the Commission may review an "act" or a failure to act; it need not wait until a local government takes a "final action."[55]

There are sound reasons why Congress gave this Commission more latitude than courts in reviewing local governmental actions. Courts are limited to reviewing "*decisions* regarding the placement, construction, and modification" of CMRS facilities;[56] in contrast, Congress has charged the Commission with preventing local governments from "*regulat[ing]*" CMRS facilities "on the basis of the environment effects of radio frequency emissions" — whether this regulation is undertaken in the context of a particular site application or generically as part of an ordinance of general applicability.[57] Because non-final acts of local governments may constitute impermissible regulation (*e.g.*, a decision to study RF effects further), the Commission's rules should track the language of the Communications Act: the Commission may review any "act or failure to act by a State or local government . . . that is inconsistent with clause (iv)."[58]

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[55] *See, e.g., Florida Public Telecommunications Ass'n* v. *FCC*, 54 F.3d 857, 860 (D.C. Cir. 1995)("[W]hen Congress uses different language in different sections of a statute, it does so intentionally.").

[56] 47 U.S.C. § 332(c)(7)(A)(emphasis added).

[57] *Id.* § 332(c)(7)(B)(iv)(emphasis added).

[58] While U S WEST agrees with the proposal that a "failure to act" should be determined "on a case-by case" basis, it does not understand the relevance of the inquiry regarding the "average length of time it takes to issue various types of siting permits." *Notice* ¶ 138. The Communications Act prohibits *any* local government regulation of RF emissions — *regardless* of the average length of time it takes a particular government to process a siting permit. Thus, for example, the 1996 Act gives the Commission the authority to become involved if a local government defers consideration of a siting application as a result of citizen concerns for RF emissions.

B. Congress Clearly Intended the Commission to Preempt All Local Regulation Based on RF Emissions, Including Regulation Only Partially Based on RF or For Which No Formal Justification Is Provided

The Commission tentatively concludes that local regulations "do not have be to be based entirely on the environmental effects of RF emissions in order for decisions to be reviewed by the Commission" and that it may also review those regulations that "appear to be based on RF concerns but for which no formal justification is provided."[59] U S WEST agrees.

Congress has made clear that local governments are prohibited from regulating, "directly or indirectly," CMRS facilities based on the environmental effects of RF emissions.[60] Federal courts have defined the term "indirectly" broadly to include "circuitous; not leading to aim or result by the plainest course or method or obvious means; roundabout; not resulting directly from an act or cause but more or less remotely connected."[61] An actor may also use indirect means to "disguise [its] intent."[62]

The Supreme Court held long ago that "that which cannot be done directly, ought not be permitted to be done indirectly or circuitously."[63] Because Congressional intent would be

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[59] *Notice* ¶¶ 139-40.

[60] Conference Report at 208.

[61] *Cahen Trust v. United States,* 292 F.2d 33, 36 (7th Cir. 1961); *see also Maryland Casualty Co. v. Scharlack,* 31 F. Supp. 931, 933 (S.D. Texas 1939).

[62] *See Marathon Oil Co. v. Mid-Continent Underwriters,* 786 F.2d 1301, 1304 (5th Cir. 1986).

[63] *Green v. Biddle,* 21 U.S. 1, 13 (1823); *see also Fairbank v. United States,* 181 U.S. 283, 294 (1900)("[W]hat cannot be done directly . . . cannot be accomplished indirectly by legislation which accomplishes the same result.").

frustrated if local governments were allowed to circumvent the Commission's preemption authority through the simple expedient of reciting reasons other than RF emissions or providing no reasons at all, the Commission should exercise its authority whenever there is evidence that local government action or inaction was based in whole or in part on RF emission concerns.[64]

C. Modified Declaratory Ruling Procedures May Be Appropriate

The Commission proposes to require carriers seeking preemption to file a request for declaratory ruling and to apply Commission Rules 1.45 through 1.49 to the proceeding.[65] It might instead be appropriate for the Commission to adopt revised procedures for actions brought against state or local governments.

Rule 1.45(a) permits the submission of an opposition to a declaratory ruling petition "within 10 days after the original pleading is filed."[66] This response time has worked well in the past, and 10 days gives a city attorney ample time to prepare a response; after all, a municipality should already be aware of the RF issues on which it rested its challenged action. However, a city attorney may be required to review his or her opposition with the mayor (or city manager) who, in turn, may require consultations with the council and/or local zoning board. Consequently, U S WEST does not oppose PCIA's recommendation that local governments be

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[64] While U S WEST agrees that each situation must be reviewed on "a case-by-case basis," it believes it is premature for the Commission to develop now a firm policy that it will preempt "only that portion of an action or failure to act that is based on RF emissions and to permit the adversely-affected party to seek [judicial] relief from the remainder of the state or local regulation." *Notice* ¶ 139. The Commission may find in some instances (and perhaps in many instances) that is not practically possible to sever local government actions so easily.

[65] 47 C.F.R. § 1.45 *et seq.; see Notice* ¶ 149.

[66] 47 C.F.R. § 1.45(a).

given 30 days in which to respond to a declaratory ruling petition filed by a carrier — *so long as* the other expedited procedures discussed herein are adopted.[67]

D. The Commission Should Implement Default Judgment Procedures

The Commission has recognized the importance that preemption petitions be resolved rapidly.[68] With regard to other proceedings, the Commission has adopted default judgment procedures to achieve rapid resolution of the issues.[69] The Commission should adopt the same procedures here. A local government which makes no attempt to defend its challenged activity should not benefit by additional delays caused by the processing of the preemption petition in the ordinary course.

E. The Commission Should Ordinarily Resolve Preemption Petitions Within 30 Days

Again, the Commission has recognized the importance that RF emissions preemption petitions be resolved rapidly.[70] The speed by which parties file their pleadings has

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[67] *See* Letter to Michele Farquhar, Chief, and Rosalind Allen, Deputy Chief of Wireless Telecommunications Bureau, from Jay Kitchen, PCIA President (filed March 19, 1997)("PCIA Letter").

[68] *See Notice* ¶ 118.

[69] *See, e.g.,* 47 U.S.C. §§ 1.724(b)("Any party failing to file and serve an answer within the time and in the manner prescribed by these rules may be deemed in default and an order may be entered against defendant in accordance with the allegations contained in the complaint."), 76.956(e)("A cable operator that fails to file and serve a response to a valid complaint may be deemed in default. If the Commission deems a cable operator in default, the Commission may enter an order against the cable operator finding the rate to be unreasonable and mandating appropriate relief."). Indeed, the Cable Services Bureau entered several default orders just last week. *See, e.g., US Cable,* CUID No. SC0256, DA 97-2096 (Cable Serv. Bur. released Sept. 29, 1997).

[70] *See Notice* at 49 ¶ 118.